Rev. Statutes U. S.), and the defendants could not have interposed the assignment, and Johnson's title under it, as a defence, because as against the assignment was void.

Undoubtedly, when the assignment was set aside at the suit of the trustee in bankruptcy, the title of the trustee related back to the time of the assignment. But the doctrine of relation is never applied to defeat a remedy, and cannot be invoked to subject the plaintiff to a disability which otherwise would not exist.

Judgment is ordered for the plaintiff.

Supreme Court of Indiana.

FRANK HAUSMAN *v.* A. T. NYE ET AL.

Where one purchases a number of articles at one time and by the same contract, he is not obliged to accept any unless all be delivered.

A delivery to a common carrier, not selected or designated by the purchaser, is not such a delivery or acceptance of goods as will take the contract out of the Statute of Frauds.

Whether such a delivery, in the case of a contract valid in itself, might be sufficient to transfer the title and risk to the purchaser, *quære*.

ON error to Daviess Circuit Court.

This was an action for the price of a number of stoves, purchased by defendant, but which he refused to receive, on the ground that his whole order was not filled. The court below gave judgment for the plaintiff. The facts sufficiently appear in the opinion.

Mason & Bynum and *Burns & Burns*, for appellant.

Gardiner & Armstrong, for appellees.

The opinion of the court was delivered by

PERKINS, J.—The contract in the case between the plaintiff and the defendant, embraced all the articles in the bill of particulars sued on and others in addition. One of the plaintiffs in his testimony said: "I shipped the goods, as per Mr. Hausman's order, to Scott, with the exception of three number seven Charm heating stoves, which we could not at that time ship, as they were not then on hand." The defendant below, Hausman, in his testimony stated that "he ordered other goods at the same time, viz.: ordered three number seven Charm heating stoves but they did not come. I ordered all these goods at one time, and would

not have ordered part without the rest. I needed the stoves which did not come in my business."

The contract was an entire contract for the whole of the bill of goods ordered, and the defendant, Hausman, was not obliged to accept the part shipped: *Smith* v. *Lewis*, 40 Ind. 98.

Again, the contract was void by the Statute of Frauds. It was an Indiana contract made at Washington, in this state, between the defendant, Hausman, and Sanford W. Scott, agent of the plaintiff, with full power to make the same a finality: *Kiewert* v. *Myers*, 61 or 62 Ind. (not yet reported). Our statute reads thus: "No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

In this case the contract was for the price of over fifty dollars; no part of the property was received by the purchaser; no earnest was given to bind the bargain or in part payment, and no note or memorandum signed by the party to be charged or his lawfully authorized agent was made.

It is claimed that there was a delivery and acceptance of the goods under contract. Scott, the agent of the plaintiffs, testified touching the contract as follows: "In behalf of the plaintiffs, some time in September, A. D. 1874, I sold to Mr. Frank Hausman two number two Onega stoves at $10 each; two number three Onega stoves at $15 each; two number seven Alladine cook stoves, with ware, at $11 each; three number seven Charm heating stoves at $4.50 each; three number eight Charm heating stoves at $5.50 each. The terms of sale were ninety days credit. The freight was to be paid by plaintiffs to Cincinnati, and the goods to be shipped at the defendant's risk."

Hausman, the defendant, testified: "It was agreed when I ordered the goods that the plaintiffs should ship them from Marietta, Ohio, to Washington, Indiana, and that they should pay the freight to Cincinnati, Ohio, and I the rest of the way. Nothing was said by either him or me about shipping the goods at my risk."

As to the manner of the shipment made of the goods, Mr. Nye, one of the plaintiffs, testified: "The plaintiffs delivered the goods in the said invoice mentioned upon the wharf-boat of Hall & Bert,

steamboat agents and owners of the Marietta wharf-boat at Marietta, Ohio, marked and directed plainly to Frank Hausman, Washington, Daviess County, Indiana, consigned to the Ohio & Mississippi Railroad, Cincinnati, Ohio. Bills of lading were taken, one of which was sent to Hausman."

Nothing was said between the parties at the time of the contract or afterwards as to the manner or route or vessel in or by which the goods were to be shipped, nor as to the carrier to whom they were to be delivered. The bill of lading signed by Hall & Bert recited a shipment of goods by Nye & Son "on board the good steamboat 'Chesapeake' to be delivered at the port in Cincinnati unto the Ohio & Mississippi Railroad Company or assigns, they paying freight, &c. Marked, Frank Hausman, Washington, Ind."

The contract, as we have said, was an Indiana contract and void under the Statute of Frauds. It was not executed by what was done in Marietta, Ohio, claimed to have constituted a delivery and acceptance, or rather, as the statute requires, a reception by the purchaser of the goods or a part thereof: 1. Because the contract was entire for the delivery of all the goods or none. The delivery of a part to a carrier in the absence and without the knowledge of the vendee, could be no delivery under and pursuant to the contract; 2. A delivery to a carrier, not named by the vendee, was not a delivery to the vendee.

It was once held that a delivery to a common carrier, not selected by the purchaser by the latter's direction, was an acceptance by the purchaser within the statute: *Hart* v. *Sattley*, 3 Camp. 528. But this case has not been followed in later cases: *Spencer* v. *Hale*, 30 Vt. 314. In *Rodgers* v. *Phillips*, 40 N. Y. Court of App. 519, it is decided that, "Upon a verbal contract for the sale of goods for more than fifty dollars in value, a delivery of them, in accordance with such contract, to a general carrier, not designated nor selected by the buyer, does not constitute such a delivery or acceptance, under the Statute of Frauds, as to pass the title to the goods;" although, in the case of a contract itself valid, such a delivery might be sufficient to transfer the title and risk to the purchaser. But it is not necessary that we should express an opinion upon this point. See *Strong* v. *Dodds*, 47 Vt. 348. Also, on the general subject, the elaborate case of *Bacon* v. *Eccles*, 43 Wisconsin 227; *Allard* v. *Greasart*, 61 New York 1. In *Lloyd* v. *Wright*, 20 Geo. 574, it is said, in the opinion of the court:

"Under the proof, was this case within the 17th section of the Statute of Frauds? The statute requires that the purchaser shall 'actually receive' the goods. But although goods are forwarded to him by a carrier by his direction, or delivered abroad, or on board of a ship chartered by him, still there is no actual acceptance to satisfy the act, so long as the buyer continues to have the right either to object to the *quantum* or quality of the goods." See also Chitty on Contracts 392; Story on Contracts 381, 383; *Acebal* v. *Levy*, 10 Bingham 376; *How* v. *Palmer*, 2 B. & A. 321; *Sheppard* v. *Prassy*, 32 N. H. 49.

In *Maxwell* v. *Brown*, 39 Me. 98, the court say: "From the language of this statute, it is apparent that, when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound." In *Baldey* v. *Parker*, 2 B. & C. 37, it was formerly considered, observed BEST, J., "that a delivery of the goods by the seller was sufficient to take a case out of the 17th section of the Statute of Frauds; but it is now clearly settled that there must be an acceptance by the buyer as well as a delivery by the seller."

In the same case HOLROYD, J., said: "As long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute."

Judge WRIGHT, in *Shindler* v. *Houston*, 1 Comstock (N. Y.), p. 299, says: "The best considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all liens for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he should have precluded himself from taking any objection to the quantities or quality of the goods sold." See *Kirby* v. *Johnson*, 22 Mo. 354; *Kiewart* v. *Myers*, *supra*; *Hewes* v. *Jordan*, 39 Md. 472; *Hooker* v. *Knob*, 26 Wis. 511; *Stone* v. *Browning*, 51 N. Y. 211; *Gibbs* v. *Benjamin*, 13 Am. Law Reg. (N. S.) 93 and note; *Stone* v. *Browning*, 68 N. Y. 598; *Edwards* v. *G. T. Railroad Co.*, 54 Me. 105; *Johnson* v. *Celter*, 105 Mass. 447.

In the case at bar the contract was void by the Statute of Frauds. There was no acceptance of the goods by the purchaser.

The judgment is reversed with costs, and the cause remanded for a new trial.